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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-136

RUSHTON & MERCIER WOODWORKING CO., INC. & RAND & COMPANY, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The memorandum and order of the court of appeals (Pet. 32-34) are unreported. The Board's decision and order are reported at 203 NLRB No. 17 (Supp. App. 1-72).[1]

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[1] "Supp. App." refers to the supplemental appendix to the petition.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1974 (Pet. 32). On May 31, 1974, Mr. Justice Brennan extended the time in which to file a petition for writ of certiorari to August 19, 1974, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that Rushton & Mercier was a continuation and *alter ego* of Rand and that the companies violated the National Labor Relations Act by refusing to recall Rand's laid-off employees because of their representation by Local 51, refusing to bargain with Local 51, and recognizing District 50.

2. Whether the Board properly found that the letters offering re-employment to the laid-off Rand employees were insufficient to toll backpay liability.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3-5.

STATEMENT

A. The Board's Findings of Fact

Prior to April 30, 1971, Rand manufactured store fixtures at its plant in Boston, Massachusetts. Mor-

ris Rand is president of the company and his wife owns all of its stock (A. 11, 151, 158).[2] Most of Rand's employees were carpenters, included in a craft unit represented by Local 51[3] (A. 14, 89-90). Rand had collective bargaining agreements with Local 51 for over 20 years—it signed the area contract which the union negotiated with the Woodworking Association of Boston & Vicinity (A. 11, 201).

Prior to 1971, Rand's principal customer was Zayre Company, a national chain of discount department stores (A. 12, 285). However, in January 1971, Rand lost the Zayre account (A. 13-14, 328-330, 333). Thereafter, John Burke was hired as Rand's production manager and began his new job on April 5, 1971[4] (A. 13-14, 332). Burke scheduled the work on the remaining orders to be completed by April 30, the day the current Local 51 contract was to expire (A. 14, 199, 334-335).

About the middle of April, Burke told Richard Infantino, a carpenter, that a shutdown would soon be necessary because "they [Rand] were having trouble competing with other companies and they needed men at a different pay scale. They couldn't afford to pay Local Union 51 rates, which were then $4.80 an hour, and would have been higher after the contract" (A. 15, 250). On the afternoon of

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[2] "A." refers to the appendix, and "S.A." to the supplemental appendix, to the briefs in the court below.

[3] Local 51, United Brotherhood of Carpenters and Joiners of America, AFL-CIO ("Local 51").

[4] All dates hereafter are in 1971 unless otherwise indicated.

April 30, Burke laid off 22 of the remaining 24 carpenter-unit employees still on the payroll and 8 of 9 non-unit employees (A. 16, 200).

After Rand closed its plant on April 30, it continued to receive some small orders, most of which were subcontracted to Rushton & Mercier (hereafter "R&M"), which was located in Salem, New Hampshire (A. 17, 186). This company was owned by Thomas Rushton and Edward Mercier, who had equal shares, and Clarence Hall, who had a smaller share (A. 17, 236). Prior to June 25, R&M had two employees, and had never bargained with a union (A. 18, 173-174). Before Rand began subcontracting the manufacture of store fixtures to R&M, its principal product was kitchen cabinets (A. 18, 349).

Burke learned that R&M was encountering economic difficulties and he reported this to Mr. Rand, who asked Burke to investigate its financial situation (A. 19, 167). After Burke's investigation, Rand decided not to purchase R&M as a going concern, but instead to purchase its name and goodwill (A. 19, 203-205).

A contract of sale was prepared by Arthur Wasserman, counsel for Rand, and, on June 25, Burke met in Salem with the owners of R&M and their attorney for final negotiation of the sale (A. 19, 350-352). R&M agreed to sell its name and goodwill to Rand for $1,000 (A. 19, 351). A sale agreement was signed by the parties, which provided in pertinent part as follows:

> 1. SELLER [i.e., Rushton & Mercier (New Hampshire)] agrees that for a period of four (4) months or more (as BUYER [i.e., Rand & Co.] may determine) from the date hereof, SELLER will conduct its business in the regular and usual course and shall manufacture such work for BUYER as BUYER may choose SELLER to manufacture for it, all such work to be performed at Seller's premises and in accordance with the terms and conditions of this Agreement [i.e., for costs plus 7½ percent profit].
>
> * * * * *
>
> 4. Tom Rushton, an employee of SELLER, agrees to work for BUYER or for a new corporation to be formed by BUYER utilizing the name (or any modification or variation thereof) conveyed to BUYER by this Agreement, in a capacity similar to that now served by the said Rushton or in such capacity as BUYER may request, BUYER hereby agreeing to pay him at the rate of (SEE ATTACHED SCHEDULE). Such employment shall commence upon the termination of Seller's business operation under its present corporate name or at such time as BUYER shall so request. [A. 20, 120, 121.]

Both of these provisions were included at Rand's insistence (A. 20, 227-228).

The following Monday, June 28, two organizers for District 50,[5] Domenic DiPilato and William Foley, visited the R&M facility and invited all the employ-

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[5] International Union of District 50, Allied and Technical Workers of the United States and Canada, and its Local Union 13974 ("District 50").

ees to lunch at the 88 Restaurant. The increase in R&M's business as a result of the Rand subcontracts had required it to hire four new employees (A. 210). All six R&M employees working in the shop that day attended the luncheon, and thereafter signed District 50 organization cards (A. 20-21, 230-231). That afternoon DiPilato returned to the R&M plant, where he requested recognition for District 50 on the basis of the signed cards (A. 21, 175-176). Thomas Rushton referred DiPilato to Burke, who inspected the cards but did not give an immediate answer. DiPilato departed, leaving a recognition agreement form with Burke (A. 21, 176). Burke took the agreement to Boston, obtained Rand's approval of it, and then returned to Salem and gave R&M permission to recognize District 50 (A. 21, 179-180). On July 1, R&M signed a recognition agreement with District 50 (A. 21, 180-181).

In the ensuing negotiations on a collective bargaining agreement, Burke acted as sole negotiator for R&M although he frequently sought Wasserman's approval (A. 21, 118-119). On August 3, agreement was reached on a three-year contract, which was back-dated to June 28 (A. 21, 133-134, 367-368). The contract provided for various grades and job classifications; the highest non-supervisory wage rate was $4 per hour for a millman and the lowest was $2 per hour for a laborer (A. 21, 135, 136). It also provided for a 30-cent per hour raise across-the-board in the second and third years of the agreement. Article I of the contract provided that the company

would recognize District 50 as the exclusive bargaining agent for all production employees and "that such recognition is limited to employees in the company's plant at Salem Depot, New Hampshire, or any subsequent or new location of this plant" (A. 21-22, 123-124). This latter phrase was included at Burke's suggestion (A. 22).

During June, July, and August, all the work turned out by R&M in New Hampshire was work subcontracted by Rand. Around the end of August, Burke informed DiPilato that the work was going to be returned to Boston in the near future (A. 22, 352-353). On September 2, a wholly-owned subsidiary of Rand was incorporated in Massachusetts under the name of Rushton & Mercier Woodworking Co., Inc., the name Rand had purchased from Rushton & Mercier (New Hampshire) (A. 22, 136-137). Morris Rand became president, treasurer, and one of the directors of the "new" company (A. 27, 54, 157). The other two directors were Frank Fiorella, former production and sales manager for Rand & Co., and John Burke (A. 22, 54, 158). The company was capitalized at $100,000, comprised entirely of machinery and other assets of Rand (A. 22). It leased the basement, third floor, and part of the second floor of Rand's manufacturing plant (A. 22, 54, 193).

On August 28, Burke conferred with DiPilato about the move to Boston and agreed to recognize District 50 as the representative of employees of R&M (Massachusetts) and apply District 50's contract with R&M (New Hampshire) to them after

the move (A. 23, 353-354). On September 7, R&M (Massachusetts) began operations with Thomas Rushton, Clarence Hall, and all six of the employees formerly employed by R&M (New Hampshire) (A. 23, 219, 354). Edward Mercier continued operations at the Salem plant, using his own name until December, when the building was sold as part of the liquidation of R&M (New Hampshire). R&M (New Hampshire) still exists as a corporate entity, although it has no assets and no business activities. (A. 23, 246.)

Immediately after production began in Boston, R&M began to expand its work force and placed advertisements in newspapers (A. 23, 354). No attempt was made to make contact with any of the carpenters represented by Local 51 whom Rand had laid off in April. Several of the laid-off carpenters came to the plant, however, and were offered jobs as new employees at the lower rates specified in the District 50 contract (A. 23; S.A. 7).[6]

By late October, R&M had expanded its work force to approximately 20 employees, including four or five former Rand employees whom R&M hired in September (A. 24, 210). Among those hired in September were Frank Tino and Pasquale Colacetti. Shortly after they were hired, Thomas Rushton gave them a number of forms to be filled out, including an authorization form to deduct District 50 dues from their wages (A. 24; S.A. 7-8).

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[6] The new agreement between Local 51 and the Association contained a wage rate of $5.35 per hour (A. 12, 214-215).

When Tino and Colacetti refused to authorize the deduction, Rushton told them that they would have to sign in order to continue working for R&M. Tino and Colacetti thereupon quit (*ibid.*). After learning that production had been resumed in Rand's old plant, Mario Natale, business agent for Local 51, talked to Wasserman, who denied that Rand had reopened its plant (A. 24-25, 142).

Despite the efforts of Rand Sales Manager Frank Fiorella, Rand had been unable to obtain any contracts similar to those it had previously received from Zayre. Consequently, all of the work performed by R&M (Massachusetts) since September 7 was similar to the work Rand had previously subcontracted to R&M (New Hampshire). (A. 25; S.A. 12-13.)

On October 26, November 26, and March 17, 1972 —after Local 51 had filed unfair labor practice charges with the Board—R&M sent the following letter to the laid-off Rand employees (A. 63, 147):

> Dear ————————,
>
> The undersigned company hereby offers you employment in the manufacturing operations at its plant located at 300 C Street, South Boston, the location of the plant formerly operated by Rand & Company, Inc.
>
> This offer of employment includes all of the rights and privileges, if any, to which you might be legally entitled by virtue of your former employment, at said location, with Rand & Company, Inc.

> If you are interested in our offer of employment please report to the undersigned in person at the above address as soon as possible.
>
> If we have not heard from you by 3 working days after receipt of this letter, we will assume you are not interested in this offer of employment with the undersigned company.
>
> Very truly yours,
>
> RUSHTON & MERCIER WOODWORKING, INC.
>
> Thomas Rushton
> Plant Manager

When the employees responded to this letter, Burke interviewed them. He made two points:

> Number one, we told these people that there was a union present who had a union scale and that they would be interviewed. And based on their ability to convince the supervisor, Rushton, of their skills, he would offer them a job somewhere on that scale or whatever he thought they qualified. And they could ultimately move up as they proved themselves. Secondly, as to the sentence in here (the letter) involving rights and privileges, we understand that there was a suit pending by their union versus Rand and Co., and Rushton and Mercier and Co., and that should anything result from that suit causing them to be paid at the higher rate they would get this higher rate of pay retroactively to whenever they came to work. [A. 63-64, 356-357; S.A. 9-10.]

B. The Decisions Below

On the basis of the foregoing facts, the Board, in agreement with the Administrative Law Judge, found that Rushton & Mercier (Massachusetts) is a continuance and *alter ego* of Rand (Supp. App. 54-55), and that those companies failed to recall the laid-off Rand employees because they were represented by Local 51, thereby violating Section 8(a)(3) and (1) of the Act (Supp. App. 59-62). The Board also found that the companies, in recognizing and contracting with District 50 and in withdrawing recognition from Local 51, violated Section 8(a)(2) and (5) of the Act (Supp. App. 63-64). Finally, the Board found that the letters sent to former employees on October 26 and November 26, 1971, and March 17, 1972, together with Burke's rehire interview, were insufficient to toll the companies' backpay liability (Supp. App. 64-67).

The Board ordered Rand and Rushton & Mercier (Massachusetts) to cease and desist from the unfair labor practices found and from "in any manner" interfering with, restraining or coercing employees in the exercise of their Section 7 rights; to withdraw recognition from District 50; and to reimburse employees for any initiation fees, dues, or other monies withheld from their wages for the benefit of District 50. Further, the order requires the companies to bargain collectively with Local 51; to offer the Rand employees, who were laid off on April 30, full reinstatement to their former or substantially equivalent positions, and to make them whole for any loss of

pay resulting from the discrimination; and to post the usual notices. (Supp. App. 43-47, 67-68.)

The court of appeals concluded that the Board's unfair labor practice findings were supported by substantial evidence, and enforced its order in full (Pet. 32-34).

ARGUMENT

1. The first issue raised by the petition (Pet. 11-25) is whether substantial evidence supports the Board's findings, sustained by the court below, that Rushton & Mercier was a continuation or *alter ego* of Rand and that those companies failed to recall the laid-off Rand employees because they were represented by Local 51, which the companies desired to replace with District 50. Such an issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, as shown (pp. 2-10), the record amply supports the Board's findings.

2. Petitioners further contend (Pet. 28-30) that, assuming Rushton & Mercier unlawfully refused to rehire the former Rand employees, its backpay obligations terminated when it sent out the offers of reemployment. However, the letters (*supra*, pp. 9-10) do not state that the employees would be given immediate reinstatement if their jobs existed or that they would be paid under the Local 51 contract rates. Moreover, Burke told each employee who responded to the letter "that there was a union present [which] had a union scale," and that, "based on their ability

to convince the supervisor, Rushton, of their skills, he would offer them a job somewhere on that scale" (S.A. 9-10). In these circumstances, the court of appeals properly sustained the Board's conclusion that the letters "may not be fairly construed as the sort of firm offer of reinstatement to former or substantially equivalent positions to which the Local 51 members were entitled" (Pet. 34). *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194.

3. The remaining questions raised by the petition are not presented on the record here.

a. The question whether the Board properly found that Local 51 had not waived its right to bargain collectively (Pet. 25-26) was not raised in the court of appeals,[7] and therefore is not properly before the Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. In any event, the Board correctly found that Local 50 had not waived its right to bargain collectively.[8]

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[7] There, petitioners, in support of the contention that the offers of reinstatement terminated backpay liability, merely mentioned that Rushton & Mercier (Massachusetts) considered itself bound by the agreement with District 50 since no one received any communication from Local 51 after expiration of its agreement with Rand or before Rushton & Mercier (Massachusetts) adopted the Rushton & Mercier (New Hampshire)—District 50 contract (C.A. Br. 31).

[8] A formal bargaining request while the Rand shop was closed would have served no purpose. When the plant resumed production, a representative of Local 51 asked Wasser-

b. Petitioners also contend that the Board erred in ordering reimbursement to employees for initiation fees, dues, and other monies withheld from their wages for the benefit of District 50 (Pet. 27-28). Although this remedy was recommended by the Administrative Law Judge (Supp. App. 44-45), the companies' exceptions merely objected to "the provisions contained under the 'Order' * * * in each and every respect." "Such a general objection [does] not apprise the Board that [the party] intended to press the question now presented * * *." *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255. Accordingly, this contention is not properly before this Court. Section 10(e) of the Act, 29 U.S.C. 160(e). The question is also foreclosed because it was not raised before the court of appeals (see *supra*, p. 13).

In any event, the Board properly directed the companies to assume this remedial obligation as a consequence of their unlawful recognition of District 50. A remedy providing for reimbursement of dues and fees paid under an unlawful collective bargaining agreement effectuates the remedial policies of the Act. Cf. *Sheraton-Kauai Corp.* v. *National Labor Relations Board*, 429 F. 2d 1352, 1357 (C.A. 9), and cases there cited. Such an order "returns to the employees what has been taken from them to support an organization not of their free choice and places the

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man, petitioners' counsel, about the plant's operations. Wasserman informed the union agents that Rand & Co. had not resumed operations (Supp. App. 29-30).

burden upon the Company whose unfair labor practices brought about the situation." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 541.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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